

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 21 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0195
)	DEPARTMENT A
Plaintiff,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BRADLEY ALAN SCHWARTZ,)	the Supreme Court
)	
Defendant/Appellant,)	
_____)	
)	
PIMA COUNTY and the PIMA)	
COUNTY OFFICE OF COURT)	
APPOINTED COUNSEL,)	
)	
Intervenors/Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20043995

Honorable Nanette M. Warner, Judge

AFFIRMED

Mesch, Clark & Rothschild, P.C.
By Gary J. Cohen

Tucson
Attorneys for Intervenors/Appellees

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Defendant/Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Bradley Schwartz was convicted of conspiracy to commit first-degree murder. He was sentenced to life in prison and ordered to pay as restitution the attorney fees and costs for his defense. After his appeal, the trial court assessed Schwartz his attorney fees and costs on his appeal as well. Schwartz appeals from that order, arguing the trial court lacked jurisdiction to impose additional attorney fees and costs incurred on appeal. Because the trial court had jurisdiction, we affirm.

Factual and Procedural Background

¶2 “We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the trial court’s restitution order.” *State v. Lewis*, 222 Ariz. 321, ¶ 2, 214 P.3d 409, 411 (App. 2009). Most of the facts are undisputed. The court found Schwartz qualified for court-appointed counsel on the condition that he assign his monthly disability income toward the cost of his defense.¹ After his trial, Schwartz was convicted of conspiracy to commit first-degree murder and sentenced to life in prison. He was also ordered to pay restitution totaling \$244,802.31 in attorney fees and costs for his defense. Schwartz appealed his conviction and sentence in June 2006, but he did not appeal the restitution order. This court affirmed Schwartz’s conviction and sentence in March 2008 in *State v. Schwartz*, No. 2 CA-CR 2006-0213, ¶ 91 (memorandum decision filed Mar. 31, 2008). In December 2009, appellees filed a motion requesting Schwartz be

¹The trial court later reduced this assignment based on a settlement between Schwartz, his former wife, Pima County, and the Pima County Office of Court Appointed Counsel.

assessed an additional \$36,163.79 for attorney fees and costs incurred for Schwartz's appeal. The court ordered Schwartz pay this amount based on Rules 31.5(b) and 6.7(d), Ariz. R. Crim. P. This appeal followed.

Discussion

¶3 Schwartz contends the trial court lacked jurisdiction to assess him the attorney fees and costs of his appeal or to modify the amount specified in the sentencing order. "A trial court's jurisdiction is a matter of law that we review de novo." *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 7, 207 P.3d 754, 756 (App. 2009).

¶4 Schwartz did not specifically challenge the trial court's jurisdiction prior to the court's ruling on the appellees' motion.² However, he asserts the court lacked subject matter jurisdiction, and subject matter jurisdiction cannot be waived.³ *See State v. Silva*,

²Schwartz appeals only from the court's May 18, 2010 order. He does not appeal from the court's ruling on his motion for reconsideration in which he challenged the court's jurisdiction.

³To the extent Schwartz challenges the court's personal jurisdiction, he did not raise the issue below and, thus, did not preserve the argument for review. *See State v. Marks*, 186 Ariz. 139, 141, 920 P.2d 19, 21 (App. 1996) ("Personal jurisdiction may be waived . . ."); *see also State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). Therefore, Schwartz has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental, prejudicial error). Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

222 Ariz. 457, ¶ 9, 216 P.3d 1203, 1205 (App. 2009) (“[S]ubject matter jurisdiction is never waived and can be raised for the first time on appeal.”).

¶5 The superior court is a court of general jurisdiction and may exercise “the powers conferred by constitution, rule or statute,’ . . . [as well as] ‘the common law.’” *State v. Payne*, 223 Ariz. 555, ¶ 8, 225 P.3d 1131, 1135 (App. 2009), quoting A.R.S. § 12-122. The Arizona Constitution grants the superior court original jurisdiction over all felony cases. Ariz. Const. art. VI, § 14(4); see also A.R.S. § 12-123(A). The court is authorized to require a defendant reimburse the county for legal services after evaluating the defendant’s resources and the potential hardship of the reimbursement. A.R.S. § 11-584(C)(3), (D). Thus, the trial court had subject matter jurisdiction over the attorney fees issue.

¶6 Additionally, the rules on which Schwartz relies do not support his position even if we assume they could divest subject matter jurisdiction. We construe the rules on the same subject in harmony with each other. See *State v. Jernigan*, 221 Ariz. 17, ¶ 15, 209 P.3d 153, 156 (App. 2009) (“Statutes on the same subject matter are to be construed in harmony together.”); *State v. Sanders*, 205 Ariz. 208, ¶ 38, 68 P.3d 434, 443 (App. 2003) (“We interpret rules of court in the same fashion that we construe statutes.”). Rule 31.5 governs appeals by indigents and, in section (b), provides that “[t]he trial court may order an indigent defendant to contribute to the costs of appeal and services of counsel in the manner prescribed by Rule 6.7(d).” Rule 6.7 sets forth the guidelines for compensation of appointed counsel. Section (a) requires appointed private counsel to file claims for compensation “at the completion of all trial, sentencing, or post-conviction

proceedings and at the completion of all appellate proceedings.” Ariz. R. Crim. P. 6.7(a). Section (d) allows the trial court to find that an indigent defendant has financial resources to offset the cost of the legal services and to order him to pay the amount he is able without incurring substantial hardship to himself or his family. Ariz. R. Crim. P. 6.7(d). Thus, Rule 31.5 authorizes the trial court to order payment of the costs of an indigent defendant’s appeal, but those costs must be submitted by his appellate counsel after the completion of the appeal, *see* Ariz. R. Crim. P. 6.7(a). Because the costs of the appeal must be submitted after the decision on appeal, the court is able to assess those costs only after the completion of the appeal.

¶7 Schwartz argues, however, that because Rule 31.11, Ariz. R. Crim. P., divests the trial court of jurisdiction over new matters fifteen days after the perfection of an appeal, the court did not have jurisdiction over the costs of the appeal. Rule 31.11 states that “[n]o new matter, other than a petition for post-conviction relief not precluded under Rule 32.2[, Ariz. R. Crim. P.], may be filed in the trial court by any party to an appeal later than 15 days after the record on appeal has been filed.” But even assuming this rule could divest the court of subject matter jurisdiction, Schwartz’s appeal was over and the mandate had issued, returning this matter to the superior court.

¶8 Furthermore, although this rule arguably may be read to prevent the trial court from considering any new matter after an appeal has been perfected, “a trial court retains jurisdiction to act so long as that act cannot negate the decision in a pending appeal or frustrate the appeal process.” *State v. O’Conner*, 171 Ariz. 19, 22, 827 P.2d 480, 483 (App. 1992); *cf. In re Estate of Killen*, 188 Ariz. 569, 573, 937 P.2d 1375, 1379

(App. 1996) (probate court had jurisdiction to award attorney fees while appeal pending because appeal would not affect award of fees). Here, the assessment of fees on appeal could not have negated or frustrated the appeal process.

¶9 Relying on *State v. Holguin*, 177 Ariz. 589, 870 P.2d 407 (App. 1993), Schwartz further contends that the trial court's assessment of appellate costs constituted an illegal modification of his sentence. In *Holguin*, this court upheld the trial court when it failed to impose a restitution order at the time it suspended the defendant's sentence but later ordered restitution when it revoked the probation and sentenced the defendant to prison. 177 Ariz. at 590-92, 870 P.2d at 408-10. We held that a trial court retains jurisdiction over a defendant's sentence until the completion of probation or the imposition of a prison sentence. *Id.* at 591, 870 P.2d at 409. But, the case is inapposite. Here, the trial court had jurisdiction under article VI, § 14(4) of the Arizona Constitution and §§ 11-584(C)(3), (D), and 12-123(A), not based on its previous jurisdiction over sentencing. And A.R.S. § 13-804(J) provides for the assessment to be included in a restitution order.

¶10 Schwartz also argues the trial court should have ordered he contribute to his appeal "prior to the perfection of the appeal," despite the fact that the costs of the appeal then could not have been known. He alleges the county should then submit the costs to the defendant and the clerk of the court, and, if the defendant fails to pay the costs, the county must file a civil action to collect. Nothing in the rules, however, requires the court to enter such a finding at sentencing, nor do they require the county to submit a bill for costs to the defendant. *See* Ariz. R. Crim. P. 6.7 and 31.5. And a court cannot make

the discretionary finding of whether an individual can pay an amount “without incurring substantial hardship” if it does not know the amount to be paid. *See* Ariz. R. Crim. P. 6.7(d). Schwartz’s claim is unsupported by the rules. Schwartz implies other problems with the trial court’s jurisdiction to assess appellate costs but fails to support them with relevant argument. He has waived these arguments, as they are insufficient to permit appellate review. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

Conclusion

¶11 In light of the foregoing, we affirm the trial court’s assessment of appellate costs and attorney fees.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge